

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)

GTE Corporation, Transferor)

and)

Bell Atlantic, Transferee)

For Consent to Transfer of Control)

CC Docket 98-184

COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION

Jeffrey A. Eisenach, Ph.D.
President

Randolph J. May
Senior Fellow and Director of
Communications Policy Studies

THE PROGRESS & FREEDOM FOUNDATION
1301 K Street N.W.
Suite 550E
Washington, D.C. 20005
(202) 289-8928
(202) 289-6079 Facsimile

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SUMMARY

The Progress & Freedom Foundation submitted comments in an earlier round in this proceeding focusing primarily on the impact of the proposed Bell Atlantic/GTE merger on the marketplace for broadband services, and more broadly, on the context in which the FCC considers mergers. Based on PFF's extensive work in studying the transition to a world of largely digital communications, PFF's earlier comments asserted that:

- Rapid deployment of affordable broadband telecommunications services is essential to continued economic prosperity.
- The Bell Atlantic/GTE merger, and similar mergers, typically are motivated by efficiency considerations associated with telecommunications convergence generally and the rapidly developing market for broadband services in particular.
- The market for broadband communications generally is competitive.
- The Commission should not engage in a wide-ranging "public interest" review of this and similar mergers.

In these comments, PFF shows that, despite the competitive potential of the broadband market, the Commission thus far has failed to adopt a deregulatory regime that will encourage even more effective intra-modal broadband competition, including more competition in the Internet backbone market. The Commission previously has expressed concerns about the potential harmful effects of concentration in the Internet backbone market, yet its policies, which treat comparably-situated broadband providers differentially, have the effect of discouraging facilities-based investment that would increase competition.

The Commission seems intent on maintaining in place disparate regulatory strictures that serve to inhibit the incentives and ability of the former Bell Operating Companies to deploy broadband services and facilities. Thus far, for example, the Commission has rejected arguments that the interLATA restriction does not apply to broadband services or that the Commission has authority to forbear from applying Section 271. So, in the context of the proposed Bell Atlantic/GTE merger, the applicants must resort to use of vehicles such as the divestiture of the GTE Internetworking assets, thereby losing, at least for the time being, the efficiencies which the vertical integration of GTE's Internet backbone with Bell Atlantic's local broadband services would otherwise bring.

Ideally, the Commission would use this occasion to decide it does, in fact, possess sufficient authority to approve the merger without requiring resort to the divestiture of the GTE Internetworking business proposed by Bell Atlantic/GTE. Absent that, the Commission should approve the merger with the divestiture condition as proposed, so that the merged entity at least will have the opportunity to regain GTE's Internet assets as soon as possible. In that way, the prospect of entry by another potentially strong, integrated broadband services provider should exert a salutary competitive effect on the broadband marketplace.

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**COMMENTS OF
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I. INTRODUCTION

The Progress & Freedom Foundation ("PFF" or "Foundation") is a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy. PFF's research and analysis have focused heavily on issues related to the deployment of broadband digital communications and the consumer benefits which will flow from widespread broadband deployment and the resulting emergence of a digital economy.¹ A recent example of this research work is

¹ See especially Comments of The Progress & Freedom Foundation, CC Docket 98-146, September 14, 1998; see also Jeffrey A. Eisenach, Testimony Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, (April 22, 1998); Randolph J. May, "Putting Consumers First: Turning the Corner on Long-Distance Competition," *Progress on Point 7.1*, (February 2000); Randolph J. May, "On Unequal Playing fields: The FCC's Broadband Schizophrenia," *Progress on Point 6.11* (December 1999); Jeffrey A. Eisenach, "Into the Fray: The Computer Industry Flexes Its Muscle on Bandwidth," *Progress on Point 5.9* (December 1998); and, Donald W. McClellan, Jr., Esq., "A Containment Policy for Protecting the Internet from Regulation: The Bandwidth Imperative," *Progress on Point 4.5* (August 1997).

PFF's *Digital Economy Fact Book*,² released in August 1999. This book contains a wealth of information concerning the growth of the telecommunications and information technology sector, including, of course, the Internet, and the impact of the digital revolution on various aspects of our daily lives.

PFF filed comments earlier in this proceeding focusing on the impact of the proposed Bell Atlantic/GTE merger on the marketplace for broadband services, and, more broadly, on the context in which the FCC should consider mergers.³ Based on PFF's work in studying the transition to a world of largely digital communications, PFF's earlier comments asserted that:

- Rapid deployment of affordable broadband telecommunications services is essential to continued economic prosperity.
- The Bell Atlantic/GTE merger, and similar mergers, typically are motivated by efficiency considerations associated with telecommunications convergence generally and the rapidly developing market for broadband services in particular.
- The market for broadband communications generally is competitive.
- The Commission should not engage in a wide-ranging "public interest" review of this and similar mergers.⁴

PFF urged the Commission, without undue delay and without onerous conditions, to approve mergers, such as the then-pending AT&T/TCI merger and the Bell Atlantic/GTE proposal, "that promise more rapid deployment of affordable digital broadband services."⁵

² See Erran Carmel, Jeffrey A. Eisenach, and Thomas M. Lenard, *The Digital Economy Fact Book* (Washington, DC: The Progress & Freedom Foundation, 1999).

³ Comments of The Progress & Freedom Foundation, CC Docket No. 98-184, December 23, 1998 (hereinafter "PFF Comments").

⁴ PFF Comments, at 2.

⁵ Id., at 3.

Despite PFF's hopes at the time it filed its earlier comments, but consistent with the trend over the last several years, the applicants in this proceeding now have reached the point at which they are induced to step forward and offer "voluntary" conditions designed to address whatever concerns the Commission may have about the merger. Because the Commission chooses to review the Bell Atlantic/GTE and similar merger applications not under the authority it possesses under the Clayton Act to determine whether the proposed merger will substantially lessen competition,⁶ but rather under the indeterminate "public interest" standard, the Commission's potential "concerns" can be wide-ranging.⁷ This leads to an inappropriate "regulation by condition" regime.⁸ As PFF stated in its earlier comments in this proceeding, the FCC's merger review process "is rife with opportunities to pursue unwise (if sometimes popular) "social/political" goals, even where there is no specific statutory mandate to do so."⁹

True to form, on January 27, 2000, Bell Atlantic and GTE submitted a "Supplemental Filing" proposing "a comprehensive package of commitments" patterned closely after the conditions adopted by the Commission in approving the SBC/Ameritech merger.¹⁰ Bell Atlantic/GTE claimed the merger "readily satisfies the Commission's public interest standard with no conditions," but nevertheless stated they were proposing

⁶ 15 U.S.C. § 21 (granting the FCC authority to enforce Clayton Act where applicable to common carriers engaged in wire or radio communication or radio transmission of energy).

⁷ See PFF's Comments at pages 17-24 for a discussion of the harms engendered and risks created by the way in which the Commission has been engaging in merger review under the public interest standard.

⁸ Note that the Commission's increasing tendency to "regulate by condition" is not limited to the merger review context. It is very much alive and well, indeed, one might say thriving, in the context of review of Section 271 applications. See Ameritech and SBC Communications Inc., For Consent to Transfer control of Corporations Holding Communications Licenses, CC Docket no. 98-141, FCC 99-279, released October 8, 1999; NYNEX Corporation and Bell Atlantic Corporation, For Consent to Transfer Control, 12 FCC Rcd 19985 (1998).

⁹ PFF Comments, at 20. One former FCC Senior Attorney recently called such conditions "obscene" and "a way of . . . shaking down the industry." See comments of Lawrence Spiwak before the Public Forum on a New FCC for the 21st Century, June 6, 1999, at www.fcc.gov/21st_century/Jun11/tr990611.txt.

¹⁰ Supplemental Filing of Bell Atlantic and GTE, CC Docket No. 98-148, January 27, 2000, at 2.

conditions in order “to facilitate prompt approval.”¹¹ The proposed conditions are wide-ranging and, for the most part, now familiar—everything from establishment of a separate affiliate to provide data services to extending the terms of interconnection agreements to company-wide areas to deployment of advanced services in low income and rural areas.¹²

A significant portion of the Supplemental Filing concerns the commitment by the applicants to place GTE-Internetworking’s Internet backbone and related data business into a newly-created public corporation (“DataCo”) that will be owned and controlled by third party shareholders. Under the proposal, the merged company will hold only a ten percent equity interest in the new corporation and an option to increase its ownership interest to a controlling interest “once it receives sufficient interLATA relief to operate the business.”¹³ The option will be exercisable only for five years from the closing of the merger, so as to provide the merged entity with an incentive to secure whatever Section 271 relief it needs to reclaim the divested GTE-Internetworking assets.

The Supplemental Filing spells out all of the structural safeguards (for example, an independent board of directors) which are designed to ensure that the new “DataCo” will be operated independently of the merged entity.¹⁴ Bell Atlantic/GTE submit that the proposal “will eliminate the 271 issue.”¹⁵

The Commission has solicited public comment on the following issues it claims are raised by the Supplemental Filing: (1) the proposal to transfer the Internet backbone

¹¹ Id.

¹² For present purposes, it suffices to point out that, whatever one might think of these commitments from a socio-economic or other policy perspective, they go beyond specific requirements contained in the Communications Act or the Commission’s rules. If not, there would be no need for the applicants to make “voluntary” offerings.

¹³ Supplemental Filing, at 31.

¹⁴ Supplemental Filing, at 32-36.

and related assets of GTE Internetworking to the new DataCo corporation; (2) the potential for benefits and harms to various telecommunications markets; and (3) the voluntary merger commitments.¹⁶

II. DESPITE THE COMPETITIVE POTENTIAL OF THE BROADBAND MARKET, THE COMMISSION THUS FAR HAS FAILED TO ADOPT A DEREGULATORY REGIME THAT WILL ENCOURAGE MORE VIGOROUS INTRA-MODAL COMPETITION

In comments filed in the Commission's Section 706 proceeding concerning the deployment of advanced telecommunications capability, PFF discussed the exploding demand for broadband services.¹⁷ We argued that the broadband marketplace should develop on a competitive basis if the Commission guards against adopting a regulatory regime that has the effect of raising entry barriers for some broadband providers.¹⁸

Consistent with PFF's market analysis, and relying, in part, on PFF's comments, the Commission in its Section 706 Report determined that increasing investment in facilities and services, a large number of new providers (using diverse technologies), and burgeoning demand, including from residential consumers, augurs well for the competitiveness of the marketplace.¹⁹ The Section 706 Report contains extensive data in support of its conclusion that "as the demand for broadband capability increases, methods

¹⁵ Supplemental Filing, at 30.

¹⁶ Public Notice, "Commission Seeks Comment on Supplemental Filing," DA 00-165, released January 31, 2000.

¹⁷ Figures concerning demand for broadband services and other indicia of the digital economy become outdated quickly, and today's predictions usually fall short of tomorrow's reality. For some recent statistics concerning the growth of the Internet, see the Supplemental Internet Submission of MCI Worldcom and Sprint Corporation in CC Docket No. 99-333, filed January 14, 2000, at 12.

¹⁸ Comments of The Progress & Freedom Foundation, CC Docket No. 98-146, September 14, 1998. See also, Randolph J. May, "On Unequal Playing Fields: The FCC's Broadband Schizophrenia, *Progress on Point* 6.11 (December 1999).

¹⁹ See generally Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans, 14 FCC Rcd 2398 (1999)(hereinafter "Section 706 Report").

for delivering the digital information at high speeds to consumers are emerging in virtually all segments of the communications industry—wireline telephone, land-based (“terrestrial”) and satellite wireless, and cable, to name a few.”²⁰

While the Commission has determined that the broadband market is generally competitive, it has recognized that potential concentration in the Internet backbone market segment bears watching. Although measurement techniques are not standardized and market share data is not reported publicly on any type of uniform basis, it appears that MCI WorldCom, Sprint, Cable and Wireless, and AT&T presently control at least half, if not considerably more, of the backbone market.²¹ When it approved the WorldCom/MCI merger, the Commission determined that Internet backbone services likely constitute a separate product market, stating that “we agree with GTE that there do not appear to be good demand substitutes for ISPs and regional backbone service providers to obtain national Internet access with access to IBPs [Internet backbone providers].”²²

The Commission acknowledged concerns that potential concentration in the backbone market could allow the dominant backbone providers to affect adversely the terms upon which other ISPs obtain peering arrangements. This, in turn, could increase the costs of providing Internet services to end users and/or diminish service quality. Although the Commission saw no need to take action in the context of the WorldCom/MCI merger in light of MCI’s proposal to divest its Internet assets to Cable &

²⁰ Section 706 Report, at para. 4.

²¹ See the attachments to the Supplemental Internet Submission of MCI WorldCom and Sprint in Application for Consent to the Transfer of Control of Licenses from Sprint to MCI WorldCom, Inc., CC Docket No. 99-333, January 14, 2000.

²² Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., 13 FCC Rcd 18025, 18106 (1998).

Wireless, it surmised that concentration in the backbone market could lead to peering arrangements that hinder entry by smaller ISPs.²³

In our view, the Commission has acted correctly, thus far, in not adopting regulatory mandates to address whatever concerns it may have concerning potential concentration in the backbone market. We generally agree with the Commission's assessment in the Section 706 Report that "any shortages [in backbone facilities] are relatively small in scope and duration and reflect not lack of capital, construction, or technologies, but the unforeseeable and enormous increases in demand for one of the most successful technologies in recent history."²⁴

It is nevertheless true that the Commission's failure to treat comparably-situated broadband providers in a similar [de]regulatory fashion almost certainly hinders deployment of broadband facilities—both so-called "last mile" and "backbone"—that would keep up with the burgeoning consumer demand. For example, the Commission correctly has refused the calls to mandate "open access" for cable systems, but, for now, has largely refused to take steps to relax or eliminate burdensome regulatory requirements applicable to incumbent telephone company-provided broadband services.

PFF's paper, "On Unlevel Playing Fields: The FCC's Broadband Schizophrenia,"²⁵ discusses the Commission's disparate regulatory treatment of cable and telephone company-provided broadband services in considerable detail, and that discussion will not be repeated here. Suffice it to say that when the Chief of the FCC's Cable Bureau states that "[t]he decision not to regulate [cable modems] reflected a

²³ Id., at 18108-09.

²⁴ Section 706 Report, at para. 44.

²⁵ Randolph J. May, "On Unlevel Playing Fields: The FCC's Broadband Schizophrenia," *Progress on Point* 6.11 (December 1999).

fundamental understanding of what fosters creativity and innovation. Letting the market do its work...²⁶ one would hope that such fundamental understanding would extend beyond the cable modem issue. Similarly, when Chairman Kennard says in the context of discussing the cable access issue that “we should resist the urge to regulate because I think it is likely the market will sort this out... there are market incentives that will drive openness in the broadband world”,²⁷ one would hope he would extend this faith in market incentives to other participants in the same marketplace.

Unfortunately, this has not been the case. Instead, the Commission seems intent on maintaining in place disparate regulatory strictures that serve to inhibit the incentives and ability of incumbent telephone providers to deploy broadband services and facilities, even when presented with opportunities to do otherwise. The Commission’s refusal to grant interLATA relief in the context of the Section 706 petitions for relief, even on some targeted basis, is a good example of the agency’s mindset.

The Commission has rejected arguments that the interLATA restriction does not apply to broadband data services because they are “information” rather than “telecommunications” services. This despite the fact that the Communications Act defines “interLATA service” as “telecommunications” between two LATAs,²⁸ and the Commission in other contexts has gone out of its way to maintain that “information services” and “telecommunications services” are distinct and mutually-exclusive.²⁹

²⁶ “The Mind’s Eye,” Remarks by Deborah Lathen, Chief, Cable Services Bureau, FCC, at Town Hall, Los Angeles, CA, November 9, 1999, <http://www.fcc.gov/Speeches/misc/spdal902.html>.

²⁷ “Consumer Choice through Competition,” Remarks by William E. Kennard, Chairman, FCC, at the National Association of Telecommunications Officers and Advisors 19th Annual Conference, Atlanta, GA, September 17, 1999, at 6.

²⁸ 47 U.S.C. § 153 (21).

²⁹ See generally, Federal State Board on Universal Service; Report of Congress, 13 FCC Rcd 11501 (1998).

And the Commission has concluded that it lacks forbearance authority to allow the BOCs to provide broadband services on an interLATA basis, even though it is by no means clear that this result is compelled by the statute.³⁰ While Section 10 does state that the forbearance authority granted by that section is inapplicable to Section 271, Section 706 explicitly authorizes the Commission to use “regulatory forbearance” to encourage the deployment of broadband services.³¹ A good argument can certainly be made that the language in the specific section of the act dealing with the Commission’s authority to promote broadband deployment is not negated by the language in the section of the statute dealing generally with forbearance.

Finally, the Commission has delayed for more than a year even to decide whether it has authority to grant narrowly targeted interLATA relief to facilitate deployment of broadband facilities, for example, to permit BOCs to serve institutions such as universities and health care facilities.³²

In its Section 706 Report the Commission observed that “the pace of broadband deployment may need to accelerate in coming years to remain reasonable and timely.”³³ Thus, it promised that “we will not hesitate to promote competition and reduce barriers to infrastructure investment so that *all* companies have market-based incentives to invest, innovate, and meet the needs of all consumers.”³⁴ As the above recital of the

³⁰ It is fair to observe that in many other cases where its statutory authority is ambiguous the Commission is perfectly content to pursue a policy objective, with a plea for *Chevron* deference. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 US 837 (1984). For an example, see the Commission’s brief defending challenges to its *Universal Service Order* in *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421, 5th Circuit.

³¹ 47 U.S.C. §§ 160, 157nt.

³² Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 98-147, released August 7, 1998, at para. 196.

³³ Section 706 Report, at para. 98. Emphasis added.

³⁴ *Id.*

Commission's actions shows, the Commission, in fact, simply has failed to take actions that would increase the market-based incentives for the incumbent telephone companies to invest in broadband services and facilities, including backbone facilities.

III. A REQUIRED SEPARATION OF THE INTERNET BACKBONE FROM THE INTERNET LOCAL DISTRIBUTION FACILITIES WILL PREVENT THE REALIZATION OF VERTICAL EFFICIENCIES

In its December 23, 1998 comments in this proceeding, PFF stated that “[w]hen the Commission eventually approves the combined company’s entry into the inter-LATA marketplace, either in whole or—as it has suggested in its NPRM on advanced telecommunications services, through targeted inter-LATA relief—the combined company will be in a much stronger position to offer backbone services in Bell Atlantic’s region than Bell Atlantic alone.”³⁵ PFF explained that the merger would benefit consumers by reducing Bell Atlantic’s costs of deploying DSL and related broadband data facilities, while reducing GTE’s costs of marketing its services in new high-density service areas. Most importantly, both effects would capture economic efficiencies, “reducing the costs of producing broadband telecommunications services and permitting them to be offered sooner, cheaper to more consumers.”³⁶

PFF's comments in this regard were grounded in a recognition of the increasing importance of vertical efficiencies in the telecommunications marketplace. Such efficiencies, which are now widely recognized as playing important roles in motivating the AT&T/TCI/Media One, Qwest/US West, MCI/Worldcom/Sprint and AOL/Time Warner mergers, are the result of potential complementarities in network management, marketing and other core activities of modern providers of communications services.

³⁵ PFF Comments, at 8.

In this case, as PFF suggested in its 1998 comments, many of the efficiency gains that might be expected to result from the Bell Atlantic/GTE merger are the result of the potential for combining the Internet-related assets (including but by no means limited to the provision of backbone services) of GTE Internetworking with the local facilities and customer base of Bell Atlantic.

The Commission may be hampered in its analysis of such efficiencies by its own definitions. In particular, in its order approving the WorldCom/MCI merger (with the divestiture of MCI's Internet assets), the Commission explains that the Internet is an interconnected network of packet-switched networks comprised of "three classes of participants":

There are three classes of participants in the Internet: end users, Internet Service Providers (ISPs), and Internet Backbone Providers (IBPs). End users send and receive information; ISPs allow end users to access Internet backbone networks; and IBPs route traffic between ISPs and interconnect with other IBPs. Many IBPs are vertically integrated and thus are also ISPs.³⁷

But there is something critical missing from this description of the Internet's configuration. While ISPs may link end users to the Internet backbone, they must use some type of local network facilities for the connection, whether their own or someone else's. And this local network facility, whether cable, wireless, telephone loop, or whatever, which the ISP uses to connect the "end user" to the "backbone" is indubitably part of the "Internet" configuration, part of the "network of networks." There are economies of scope that result from the vertical integration of the Internet "backbone" and the Internet "local distribution facilities."

³⁶ PFF Comments, at 9.

As suggested above, these economies result from the gains realized by integrated operations of the physical facilities and the associated business functions. Thus, as the Commission noted, many backbone providers -- including MCI WorldCom and AT&T -- are vertically integrated with ISPs. Indeed, the reliability, unified billing and other benefits of such "end-to-end" vertical integration have been touted as a major advertising theme by MCI WorldCom and other similarly integrated companies.

To the extent that the interLATA restriction is construed to prohibit the BOCs from capturing the same vertical integration efficiencies as major Internet players with backbone facilities, they are obviously at a distinct competitive disadvantage from the loss of scope economies.³⁷ And the end user of Internet services suffers from the weakening of what otherwise would be a strong competitor in the broadband services market, including the backbone market about which the Commission has expressed concentration concerns.

In passing Section 271 of the Telecommunications Act, Congress struck a balance between the short-run losses consumers might incur from delaying the entry of the BOCs into the market for long-distance telephony, on the one hand, and the benefits that would accrue as a result of a more rapid transition to a competitive local telephony market, on the other. Through its expansive reading of Section 271 (and its concomitant overly narrow reading of Sec. 706), the Commission now threatens to impose upon consumers not just the costs of foregone competition in the market for long-distance telephony but, through proceedings such as this one, also to deny them the benefits of rapid innovation

³⁷ 13 FCC Rcd at 18104-05. The Commission's description is taken from Kevin Werbach, "Digital tornado: The Internet and Telecommunications Policy," OPP Working Paper No. 29, March 1997, at 10.

³⁸ See Comments of The Progress & Freedom Foundation, CC Docket No. 98-146, September 14, 1998, at 42-52.

and robust competition in the vastly more important marketplace for integrated data and other Internet-related telecommunications services.

IV. THE COMMISSION SHOULD AVAIL ITSELF OF OPPORTUNITIES TO PROMOTE DEREGULATORY POLICIES IN THE BROADBAND MARKETPLACE

Unfortunately, as shown above, because the Commission thus far either has read the Communications Act in a way that forecloses it from exercising any discretion to provide interLATA relief for broadband services or has refused to exercise whatever discretion it acknowledges it may already possess, the Commission is now faced with a proposal such as the one put forward by Bell Atlantic/GTE to divest, at least for the time being, the GTE-Internetworking business. While the divestiture proposal, with its insulation requirements and independence safeguards for “DataCo,” appears to comport with the Commission’s interpretation of what is required under Section 271, there is no doubt that, in the meantime, some of the efficiency and synergy benefits which otherwise might be realized at the outset from the merger will be lost. Under the DataCo proposal, however, it will at least be possible for the merged company to realize some efficiency gains through the joint marketing that is permissible.

From a public policy perspective, the most beneficial outcome of this aspect of the merger proceeding would be a revisitation by the Commission of its policies that unnecessarily have extended the regulatory regime heretofore applicable to the world of narrowband communications into the broadband world. More specifically, the Commission could use this occasion to reexamine whether it does, in fact, possess

sufficient authority to approve the merger without requiring resort to the type of regulatory vehicles proposed by GTE/Bell Atlantic.

As Jason Oxman put it in his OPP Paper, “The FCC and the Unregulation of the Internet”:

[T]he principal challenge for the future comes from the growing convergence of technologies, and the growing use of the Internet protocol for delivery of numerous services traditionally offered over legacy technologies. Where the distinction blurs between the regulated and unregulated, between traditional categories of service and new methods of delivering traditional services, the Commission’s challenge is to maintain its deregulatory stance towards data services and the Internet.³⁹

Mr. Oxman was correct to give the Commission credit for its early decisions, going back to the *Computer II* regime, for distinguishing between “information” and “telecommunications” services and not regulating the former.⁴⁰ He was also correct to point out that in the world of technological and business convergence, it is a fact that the “bright line” distinction between telecommunications and information services is blurring. With more services using the Internet Protocol in a packet-switched world, “it becomes increasingly difficult to determine where the telecommunications service ends and the information service begins.”⁴¹ Indeed, the Commission said itself in the *Advanced Services* proceeding that “one of the most attractive prospects that broadband creates is the blurring of previously distinct regulatory categories and the blending of old monopolies and oligopolies into a competitive “broadband market.”⁴²

³⁹ Jason Oxman, “The FCC and the Regulation of the Internet,” OPP Working Paper No. 31, July 1999, at 24.

⁴⁰ Under *Computer II*, of course, the Commission first distinguished for regulatory purposes between “enhanced” and “basic” service and that distinction is mirrored in the 1996 Act’s definitions of “information” and “telecommunications” services. See Amendment of Section 64.702 of the Commission’s Rules and Regulations, 77 FCC 2d 384 (1984).

⁴¹ Jason Oxman, at 22.

⁴² Advanced Services Report, at note 94.

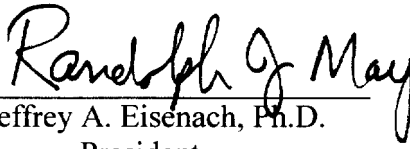
If the Commission wants to remain true to its promise in the *Section 706* proceeding to “promote competition and reduce barriers to infrastructure investment,” it must change course. It must act on the “attractive prospect” that broadband creates. It needs to heed the lessons learned from its deregulatory actions in *Computer II* and apply them more broadly so that new Internet and other data services, such as those which largely comprise the GTE Internetworking business, are not subjected to a regulatory regime devised for legacy narrowband telephone services in a monopolistic environment.

Nevertheless, if the Commission continues to believe that Section 271 precludes it from approving the merger absent acceptance of the DataCo divestiture proposal, then, at a minimum, it should accept the proposal and approve the merger promptly. Then, at least, the efficiencies to be realized from the vertical integration of GTE’s backbone Internet business with Bell Atlantic’s local broadband operations merely will be postponed, perhaps not lost permanently. And, even during the interim, the merged entity will be able to capture the efficiencies that may be realized through whatever joint marketing arrangements are permitted.

V. CONCLUSION

For the foregoing reasons, the Commission should act in a manner consistent with the views stated herein.

Respectfully submitted,


Jeffrey A. Eisenach, Ph.D.
President

Randolph J. May
Senior Fellow and Director of Communications
Policy Studies

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Suite 550E
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